

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

NOZICK, et al.

v.

DAVIDSON HOTEL CO., et al.

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Civil No. CCB-03-2988

MEMORANDUM

Now pending before the court is the plaintiffs’ motion to remand this case to the Circuit Court for Baltimore County, Maryland. For the reasons stated below, the plaintiffs’ motion will be granted.

Jerome and Hildred Nozick originally filed this action in the Circuit Court for Baltimore County on September 8, 2003 against defendants Davidson Hotel Co., AMS Carpet Cleaning Co. (“AMS”), and John Does I, II, and III, who are identified as “the unknown natural persons who own and operate AMS.” (Compl. at ¶ 4.) The complaint alleges claims for negligence and loss of consortium under Maryland state law, arising from a slip-and-fall accident at a Maryland hotel. The Nozicks are citizens of Maryland. (*Id.* at ¶ 1.) Davidson Hotel is a citizen of Tennessee, AMS is a citizen of New Jersey, and the three John Does are reported to be citizens of New Jersey. (*Id.* at ¶ 2-4; Notice of Removal at ¶ 3-7.) The plaintiffs seek three million dollars in damages from the defendants. (Compl. at ¶ 21.)

On October 20, defendant Davidson Hotel filed a notice of removal in this court. The case was removable because this court would have original jurisdiction under 28 U.S.C. § 1332, based on the complete diversity of the parties and an amount in controversy over \$75,000. *See* 28 U.S.C. § 1441(a). Although the removal notice states that it is filed by the “defendants,” it is submitted and

signed only by Scott Goetsch, attorney for defendant Davidson Hotel. On November 18, the plaintiffs filed a motion for remand, based on the failure of defendant AMS to join in or consent to the notice of removal. According to the plaintiffs, AMS had been served in the state court action by certified mail on or about September 22.¹ (Pls.' Mot. at ¶ 3.) On November 25, counsel for defendant Davidson Hotel filed correspondence with the court responding to the motion. Goetsch stated that the principal for AMS had consented to removal to federal court in a telephone conversation with Goetsch prior to October 20, and that counsel for AMS had reiterated its consent to removal in a telephone conversation with Goetsch on November 25. (Letter from Goetsch, Nov. 25, 2003, at 1-2.) On December 1, defendant AMS filed a response to the plaintiffs' motion to remand stating that it consents to the federal removal.

To remove an action to federal court, the defendant must file a notice of removal with the federal district court in the district where the action is pending, containing a short and plain statement of the grounds for removal. 28 U.S.C. § 1446(a). In a civil action, the notice of removal must be filed within thirty days after the defendant receives a copy of the initial pleading or is served with process, whichever time period is shorter. *Id.* § 1446(b). If a suit involves multiple defendants that are served or receive the initial pleading on different dates, then each defendant has thirty days from its individual date of service or receipt to file or join in a valid removal petition. *See McKinney v. Bd. of Trs. of Md. Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir. 1992). The party seeking removal bears the burden of proving facts sufficient to sustain removal jurisdiction, and the federal court must remand the action to

¹ Neither of the defendants state when AMS was served, but they apparently do not challenge the plaintiff's representation that AMS was served on or about September 22.

state court if removal jurisdiction is doubtful. See Eccles v. Nat'l Semiconductor Corp., 10 F. Supp. 2d 514, 516 (D. Md. 1998); Egle Nursing Home, Inc. v. Erie Ins. Group, 981 F. Supp. 932, 933 (D. Md. 1997).

In a suit involving multiple defendants, each defendant must timely “file a notice of removal, either independently or by unambiguously joining in or consenting to another defendant’s notice,” in order for the removal to be valid. Anne Arundel County, Md. v. United Pac. Ins. Co., 905 F. Supp. 277, 278 (D. Md. 1995) (internal quotation omitted); see also Lanford v. Prince George’s County, Md., 175 F. Supp. 2d 797, 801 (D. Md. 2001); Egle Nursing Home, 981 F. Supp. at 933. Although the defendants are not required to sign the same petition, “[c]ourts have required defendants to file some written documentation of their intent to join in another defendant’s removal petition.” Anne Arundel County, 905 F. Supp. at 278. Exceptions exist for nominal defendants or defendants over whom the state court has not acquired jurisdiction, who need not consent to the removal. See Egle Nursing Home, 981 F. Supp. at 933. This apparently includes “John Doe” defendants whose identities are unknown. See Green v. America Online (AOL), 318 F.3d 465, 470 (3d Cir. 2003). Even when one of these exceptions applies, the removing party bears the burden of stating facts in its notice of removal to explain the absence of consent from the other defendant(s). See Egle Nursing Home, 981 F. Supp. at 934-35 (dismissing notice of removal and remanding to state court for failure to state why other defendants were not required to consent to removal).

The Nozicks’ motion to remand must be granted, because defendant AMS did not “file a notice of removal, either independently or by unambiguously joining in or consenting to another defendant’s notice” within thirty days of service. Anne Arundel County, 905 F. Supp. at 278. AMS was served on

or about September 22, 2003, and thus was required to file or formally join in or consent to a notice of removal in this court by October 22, which it failed to do. See 28 U.S.C. § 1446(b). Defendant Davidson Hotel suggests that AMS met the thirty-day deadline by orally consenting to removal in a telephone conversation with counsel for Davidson Hotel prior to October 20. (Letter from Goetsch, Nov. 25, 2003, at 1-2.) This argument fails under the reasoning in Anne Arundel County, where the court found that one defendant's statement to the court that the other defendant did not object to the removal petition was not sufficient to satisfy the requirements of § 1446, and cited approvingly to district court decisions finding that a defendant could not properly join in a notice of removal by voicing consent to the court through another defendant's counsel, or by informing the removing defendant of its consent. See 905 F. Supp. at 278-79.² AMS did not properly consent to removal until it filed the notice of its intent to join in the removal on December 1, seventy days after service and in clear violation of the § 1446(b) deadline.

Although the defendants do not raise this issue, the plaintiffs' motion anticipates an argument that AMS was not required to join in the original notice of removal, because it had not been served and therefore was subject to the exception for defendants over whom the state court has not acquired jurisdiction. (Pls.' Mot. at ¶¶ 2-4, 6-7.) This argument would be based on the fact that the plaintiffs' counsel had indicated to Davidson Hotel's counsel that there had been some irregularities with the

² The court in Anne Arundel County also distinguished another district court decision, in which two non-removing defendants had informally notified the court of their consent to removal during a conference held after removal but before the expiration of the thirty-day period. See 905 F. Supp. at 279. In the instant case, AMS made no such statement to the court prior to the filing of its formal notice on December 1.

service on AMS and the plaintiffs would likely try to re-serve AMS. (Id. at ¶ 2.) Although plaintiffs' counsel made this statement, AMS apparently had been properly served on September 22, and counsel for Davidson Hotel was aware prior to the filing of the notice of removal that service had been attempted. (Id. at ¶ 2-3.) Counsel for Davidson Hotel also had spoken with the principal for AMS prior to filing his notice of removal, and should have been able to confirm service on AMS at that time. (Letter from Goetsch, Nov. 25, 2003, at 1.) The burden was on Davidson Hotel to explain in the notice of removal if there was any excuse for AMS's failure to consent, and it failed to do so. See Egle Nursing Home, 981 F. Supp. at 934-35. In any event, it is clear now that the exception for defendants over whom the state court has not acquired jurisdiction does not apply to AMS.

A separate order follows.

January 6, 2004
Date

/s/
Catherine C. Blake
United States District Judge

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ORDER

For the reasons stated in the accompanying Memorandum, it is hereby Ordered that:

1. the plaintiffs' motion to remand (docket no. 8) is **GRANTED**;
2. the case is **REMANDED** to the Circuit Court for Baltimore County, Maryland;
3. copies of this Order and the accompanying Memorandum shall be sent to counsel of record; and
4. the Clerk of the Court shall **CLOSE** this case.

January 6, 2004
Date

/s/
Catherine C. Blake
United States District Judge